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GSAA HOME EQUITY TRUST 2006-13

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

In re

ALVIN L. APUAN,
Debtor(s).

Case No. 09-46768

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR GSAA
HOME EQUITY TRUST 2006-13,

Movant,

vs.

ALVIN L. APUAN, Debtor(s); GARY
FARRAR, Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(1)

DATE: February 9, 2010
TIME: 9:30 a.m.
CTRM: 35

501 "I" Street
Sacramento, CA 95814

Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2006-13 ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 5608 Distant Drum Street, North Las Vegas, Nevada 89081.

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1 On or about December 8, 2009, Alvin L. Apuan ("Debtor") filed a voluntary petition under
2 Chapter 7 of the Bankruptcy Code, and Gary Farrar was appointed as Chapter 7 Trustee. As a result
3 of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed as
4 provided in 11 U.S.C. § 362.

5 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I.**

8 **MOVANT IS ENTITLED TO RELIEF FROM THE**
9 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

10 **NO EQUITY**

11 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
12 debtor does not have any equity in the property and the property is not necessary to the debtor's
13 effective reorganization.

14 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
15 § 362(d)(2) reflects congressional intent to allow creditors to
16 immediately proceed against the property where the debtor has no
17 equity and it is unnecessary to the reorganization, even where the
18 debtor can provide adequate protection under § 362(d)(1). (Emphasis
19 added).

20 Id. at 610 (emphasis added).

21 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
22 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
23 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from
24 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
25 1984).

26 An appropriate cost of sale factor should also be added to determine if the debtor has any
27 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
28 (Bankr. S.D. Cal. 1982).

On or about February 8, 2006, Alvin L. Apuan ("Debtor"), for valuable consideration, made,
executed and delivered to Opteum Financial Services, LLC ("Lender") a Note in the principal sum of
\$247,200.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal and

1 interest payments commencing April 1, 2006, and continuing until March 1, 2036, when all
2 outstanding amounts are due and payable. The Note provides that, in the event of default, the holder
3 of the Note has the option of declaring all unpaid sums immediately due and payable. A true and
4 correct copy of the Note is attached to the concurrently served and filed Exhibits to the Declaration
5 in Support of Motion for Relief From Automatic Stay ("Exhibits") as exhibit A and incorporated
6 herein by reference.

7 On or about February 8, 2006, the Debtor made, executed and delivered to Lender a Deed of
8 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly described
9 as 5608 Distant Drum Street, North Las Vegas, Nevada 89081 (the "Real Property"), which is more
10 fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
11 incurred as a result of the Debtor's bankruptcy case may be included in the outstanding balance
12 under the Note. The Deed of Trust was recorded on February 17, 2006, in the Official Records of
13 Clark County, State of Nevada. A true and correct copy of the Deed of Trust is attached to the
14 Exhibits as exhibit B and incorporated herein by reference.

15 Subsequently, Lender's beneficial interest in the Note and Deed of Trust was sold, assigned
16 and transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
17 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C
18 and incorporated herein by reference.

19 The obligation under the Note is in default as of May 1, 2009, for failure to make payments
20 to Movant. As of December 29, 2009, the total obligation due and owing under the Note is in the
21 approximate amount of \$265,439.99, representing the principal balance of \$247,200.00, interest in
22 the sum of \$13,782.24, late charges in the amount of \$463.50, escrow advances in the amount of
23 \$2,323.00, a recoverable balance in the amount of \$1,640.00, and other charges in the amount of
24 \$31.25. This is an approximate amount for purposes of this Motion only, and should not be relied
25 upon as such to pay off the subject loan as interest and additional advances may come due
26 subsequent to the filing of the Motion. An exact payoff amount can be obtained by contacting
27 Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in
28 bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate sum

1 of \$17,755.19, excluding the post-petition attorneys' fees and costs incurred in filing the instant
2 Motion.

3 As a result of the default under the Note, a Notice of Default was recorded on August 7,
4 2009.

5 **II.**

6 **RELIEF FROM STAY**

7 **LACK OF EQUITY**

8 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
9 Statements, the fair market value of the Property is \$100,000.00. True and correct copies of the
10 Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as exhibit D
11 and incorporated herein by reference.

12 Based on the above, Movant maintains that the equity in the Property is as follows:

13	Fair Market Value:	\$100,000.00
14	Less:	
	Movant's Trust Deed	\$265,439.99
15	GMAC Mortgage's 2 nd	\$48,127.00
	Mortgage	
16	Terraces at Rose Lake HOA	\$1,710.00
	Costs of Sale (8%)	<u>\$8,000.00</u>
17	Equity in the Property:	<\$223,276.99>

18 As a result, there is little to no equity in the Property for the bankruptcy estate. Moreover,
19 since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
20 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

21 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real
22 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's
23 Statement of Intent is attached to the Exhibits as exhibit E and incorporated herein by reference.

24 **III.**

25 **MOVANT IS ENTITLED TO RELIEF FROM THE**
26 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

27 **CAUSE - LACK OF ADEQUATE PROTECTION**

28 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
protection of its interest in the Property.

1 Movant submits that adequate protection in this case requires normal and periodic cash
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
3 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtor is presently unwilling or unable to provide
5 adequate protection to the Movant and there is no probability that adequate protection can be
6 afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
8 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
11 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

12 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

13 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
14 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
15 the Property;

16 4. Permitting Movant to offer and provide Debtor with information re: a potential
17 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
18 Mitigation Agreement, and to enter into such agreement with Debtor;

19 5. Alternatively, in the event this court declines to grant Movant the relief requested
20 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to
21 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
22 and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay
23 when due (a) the monthly installments of principal and interest, as required under the Note;
24 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order to
25 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
26 filing of this motion;

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2 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
3 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
4 and

5 7. For such other and further relief as the court deems just and proper.

6 Dated: January 6, 2010

PITE DUNCAN, LLP

7 /s/ Erin Laney (CA SBN 259863)

8 ERIN LANEY

9 Attorneys for DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE FOR GSAA
HOME EQUITY TRUST 2006-13

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